

NOV 13 2012

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. NC-12-1121-PaMkH  
)  
HARRY PALMER ALTICK, ) Bankr. No. 08-10419  
)  
Debtor. )  
\_\_\_\_\_)  
)  
HARRY PALMER ALTICK, )  
)  
Appellant, )  
)  
v. ) M E M O R A N D U M<sup>1</sup>  
)  
LINDA S. GREEN, Chapter 7 Trustee, )  
)  
Appellee. )  
\_\_\_\_\_)

Argued and Submitted on October 18, 2012  
at San Francisco

Filed - November 13, 2012

Appeal from the United States Bankruptcy Court  
for the Northern District of California

Honorable Alan Jaroslovsky, Chief Bankruptcy Judge, Presiding

Appearances: Iain A. MacDonald of MacDonald & Associates argued  
for appellant Harry Palmer Altick; Jean Barnier of  
MacConaghy & Barnier, PLC argued for appellee Linda  
S. Green.

Before: PAPPAS, MARKELL and HOLLOWELL, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may have  
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th  
Cir. BAP Rule 8013-1.

1 Appellant Harry Palmer Altick ("Altick") appeals the order of  
2 the bankruptcy court sustaining the objection of chapter 7<sup>2</sup>  
3 trustee Linda S. Green ("Trustee") to Altick's claim of exemption.  
4 We AFFIRM.

5 **FACTS**

6 Altick is a senior investment advisor for Sperry van  
7 Ness/Commercial Realty Group, specializing in the sale of  
8 multifamily and office properties in Sonoma, Marin and Alameda  
9 counties. He has over thirty-three years of experience in such  
10 sales. Altick also personally invests in these properties.

11 Apparently, Altick's investments in certain properties had  
12 rapidly declined in value by 2008 and he was forced to file for  
13 bankruptcy. He was also involved in proceedings in state court at  
14 that time for the division of marital property with his former  
15 spouse. One of his investments was a 50 percent member's interest  
16 in Gold Dome, LLC ("Gold Dome"). Gold Dome owned a luxury home  
17 and three adjacent lots in Cabo San Lucas, Baja California Sur,  
18 Mexico. On March 11, 2008, the state court judge ordered the sale  
19 of Altick's interest in Gold Dome for \$350,000. A wire transfer  
20 of \$350,000 was sent that day from the purchaser, Sidney Ingram,  
21 to the special account authorized by the state court.

22 The sale was stopped when, that same day, Altick filed a  
23 petition for relief under chapter 11. According to the  
24 disclosures in Altick's original bankruptcy schedule B, he owned

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25  
26 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.  
The Federal Rules of Civil Procedure are referred to as Civil  
Rules.

1 50 percent of the equity in Gold Dome; he valued Gold Dome at \$3  
2 million with \$960,000 in debt. Altick valued his member's  
3 interest in the LLC as "unknown." He did not claim an exemption  
4 in this interest; however, Altick did claim a homestead exemption  
5 under Cal. Code Civ. P. § 704.950 in his residential real property  
6 in Greenbrae, California. Altick's schedule F listed \$43,115.95  
7 in priority unsecured claims, and \$423,073.14 in general unsecured  
8 claims.

9 On February 9, 2009, Altick filed a proposed chapter 11 plan  
10 and disclosure statement. The plan provided for payments of  
11 \$43,200 to unsecured creditors, which presumably would all go to  
12 the priority unsecured claims, with nothing to the general  
13 unsecured claims. Altick's disclosure statement also stated: "The  
14 alternative liquidation in chapter 7 would likely net no  
15 distribution to unsecured creditors as set forth in the  
16 Liquidation Analysis attached hereto as Exhibit A." The  
17 liquidation analysis predicted a negative \$26,400 for distribution  
18 after a hypothetical liquidation of Altick's nonexempt assets.  
19 Among the listed assets was Altick's member's interest in Gold  
20 Dome, which he indicated had a value of \$900,000, debts of  
21 \$960,000, no exemption, and no net equity. This disclosure  
22 statement, with a minor amendment not affecting the Gold Dome  
23 analysis, was approved by the bankruptcy court on February 24,  
24 2009. The plan was confirmed by the bankruptcy court on April 20,  
25 2009.

26 The United States Trustee ("UST") moved to dismiss or convert  
27 Altick's chapter 11 case to one under chapter 7 on January 27,  
28 2011. The UST informed the bankruptcy court that Altick had

1 failed to pay accrued UST fees, and alleged Altick was not current  
2 on payments under the plan. Altick filed a voluntary motion to  
3 convert the case to chapter 7 on March 4, 2011, admitting that he  
4 could not make the required payments under the confirmed plan.  
5 The bankruptcy court ordered conversion to chapter 7 the same day.  
6 Ms. Green was appointed to serve as chapter 7 trustee.

7 Altick was examined at a § 341(a) meeting of creditors on  
8 April 20, 2011. In response to Trustee's request for information  
9 about Gold Dome, Altick testified that:

10 It is a limited liability company that I own - I have a  
11 50 percent interest. Unfortunately, the property in  
12 Cabo which is - the real estate has been a negative  
13 cash flow every year, and that market I have been told  
14 by the brokers has a 45-year supply of inventory of  
properties for sale, and things are not selling. So, in  
my opinion, I have really no equity in that property, or  
the LLC.

15 § 341(a) Hr'g Tr. 4:20-5:2, April 20, 2011. Based on Altick's  
16 denial of equity in Gold Dome and other assets, Trustee filed a  
17 Notice of No Distribution on April 22, 2011.

18 Shortly after filing the No Asset report, Trustee was  
19 contacted by the other members of Gold Dome, Patrick and Yolanda  
20 Lopez, who offered to purchase the bankruptcy estate's interest in  
21 Gold Dome for \$10,000. Trustee filed a motion to approve the sale  
22 on May 20, 2011 (the "Sale Motion").

23 Two weeks later, on June 2, 2011, Altick filed an Amended  
24 schedule C, and for the first time claimed a \$21,000.00 "wildcard"  
25 exemption in his interest in Gold Dome under Cal. Code Civ. Proc.  
26 § 703.140(b)(5), listing the value of the asset as "Unknown." The  
27 amended schedule also omitted, and presumably withdrew, the  
28 homestead exemption Altick had previously claimed on the Greenbrae

1 property. Altick also objected to the Sale Motion.

2 Trustee objected to Altick's attempt to amend his claim of  
3 exemptions on June 8, 2011 (the "Exemption Objection"). Trustee  
4 argued that Altick had acted in bad faith by filing the amended  
5 schedule C only after he learned that his interest in Gold Dome  
6 would be sold by Trustee. Trustee suggested that creditors, who  
7 relied on Altick's statements in the disclosure statement in the  
8 chapter 11 case that all his assets were declining in value, would  
9 be prejudiced by allowing the amended exemption claim. Finally,  
10 Trustee argued that under this Panel's ruling in In re Wolfberg,  
11 255 B.R. 879 (9th Cir. BAP 2000), Altick could not amend his claim  
12 of exemption after the confirmation of his plan because the plan  
13 had the preclusive effect of a final judgment.

14 A hearing on Trustee's Sale Motion was conducted by the  
15 bankruptcy court on June 10, 2011. The court overruled Altick's  
16 objection to the sale for the "reasons for decision on the  
17 record." A transcript of that hearing is not in the record.  
18 After the Lopezes agreed to increase the purchase bid to \$40,000,  
19 the court approved the sale. Altick has not appealed that ruling.

20 Also on June 10, Altick's attorney requested to withdraw from  
21 the case. In counsel's declaration attached to the request,  
22 counsel stated that "Debtors [sic] continue to 'have questions'  
23 and to desire to take positions inconsistent with his testimony  
24 which cannot be reconciled. It is not ethically possible for me  
25 to continue in the representation of the Debtor." Chandler Dec.  
26 at ¶¶ 6-7, June 10, 2011.

27 The bankruptcy court held its first hearing on the Exemption  
28 Objection on August 22, 2011. A transcript of that hearing is not

1 in the excerpts of record or the court's docket. The bankruptcy  
2 court issued a Memorandum on Objection the same day  
3 ("Memorandum I"). In it, the court ruled in favor of Altick on  
4 the legal question argued by Trustee: "The court finds that  
5 confirmation of Altick's Chapter 11 plan did not divest Altick of  
6 his ability to amend his claim of exemptions on conversion to  
7 chapter 7. [Trustee's] objection to the claim of exemption on  
8 grounds of res judicata will accordingly be overruled."  
9 Memorandum I at 2.

10 However, the bankruptcy court determined that Trustee's  
11 arguments that Altick had engaged in bad faith in asserting his  
12 amended exemption claim could not yet be decided:

13 The allegations of bad faith and prejudice require the  
14 Court to take evidence, and are accordingly not ripe for  
15 adjudication at this time. The Court notes only that  
16 nothing submitted so far by [Trustee] would meet her  
17 burden on these issues. Pursuant to Rule 4003(e) of the  
18 Federal Rules of Bankruptcy Procedure, [Trustee] has the  
19 burden of proving that exemptions are not properly  
20 claimed.

21 Memorandum I at 2 n.1.

22 The continued evidentiary hearing on Trustee's Exemption  
23 Objection took place on February 8 and 15, 2012. The bankruptcy  
24 court heard testimony from Patrick Lopez, Mark Lee (controller of  
25 the creditor holding a secured interest in Gold Dome), Terrie  
26 Olson (Altick's ex-spouse), and Trustee. Altick also testified  
27 both days of the hearing. After closing arguments, the bankruptcy  
28 court took the issues under submission.

On February 15, 2012, the bankruptcy court entered a  
Memorandum on Objection to Claim of Exemption ("Memorandum II").  
In sum, the court held that:

1 The court is convinced that Altick intentionally  
2 misrepresented the value of his interest in Gold Dome to  
3 his creditors in his disclosure statement in order to  
4 induce them to go along with his plan. At that time,  
5 Altick knew that his interest in Gold Dome had  
6 significant value. The delay in liquidating the  
7 interest in Gold Dome resulted in greatly diminished  
8 dividend to unsecured creditors. It would be unjust to  
9 allow Altick to benefit from the fruits of his  
10 misrepresentation of claiming an exemption in Gold Dome.

11 Memorandum II at 3, February 15, 2012.

12 On February 17, 2012, the bankruptcy court entered an Order  
13 Sustaining Trustee's Objection to Claim of Exemption. Altick  
14 filed a timely appeal on February 28, 2012.

#### 15 JURISDICTION

16 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
17 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C. § 158.

#### 18 ISSUE

19 Whether the bankruptcy court clearly erred in finding that  
20 Altick acted in bad faith in filing his amended claim of  
21 exemption.

#### 22 STANDARD OF REVIEW

23 "Bad faith is a finding of fact reviewed for clear error."  
24 Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764, 774 (9th Cir.  
25 2008). A debtor's bad faith in amending an exemption claim is a  
26 question of fact reviewed under the clearly erroneous standard.  
27 Arnold v. Gill (In re Arnold), 252 B.R. 778, 784 (9th Cir. BAP  
28 2000).<sup>3</sup> "The clear error standard is significantly deferential

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29 <sup>3</sup> The Panel in In re Arnold distinguished between analysis  
30 of amended exemptions where there is a question of a debtor's  
31 right to claim an exemption, which is reviewed de novo as a  
32 question of law, and the debtor's intent in claiming the  
(continued...)

1 and is not met unless the reviewing court is left with a definite  
2 and firm conviction that a mistake has been committed." Fisher v.  
3 Tucson Unified Sch. Dist., 652 F.3d 1131, 1136 (9th Cir. 2011).

#### 4 DISCUSSION

##### 5 I. Altick's procedural argument lacks merit.

6 As a preliminary matter, Altick devotes a considerable  
7 portion of his Opening Brief to arguing that the bankruptcy court  
8 erred when it did not conclude the proceedings after the first  
9 hearing on the Exemption Objection "when it did not overrule the  
10 trustee's objection in full when it found there was no genuine  
11 issue of material fact." Altick Op. Br. at 8. For support,  
12 Altick relies on the footnote in Memorandum I quoted above where  
13 the bankruptcy court states, "The allegations of bad faith and  
14 prejudice require the court to take evidence, and are accordingly  
15 not ripe for adjudication at this time. The court notes only that  
16 nothing submitted so far by Green would meet her burden on these  
17 issues." Memorandum I at 2 n.1.

18 Altick bases his procedural argument on Bankr. N.D. Cal.  
19 R. 9014-1(b)(3)(C) which provides, "On [matters not involving  
20 objections to claims] in which the Court determines that there is  
21 a genuine issue of material fact, the Court may treat the hearing  
22

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23 <sup>3</sup>(...continued)  
24 exemption, which is a question of fact reviewed for clear error.  
25 252 B.R. at 784. In Memorandum I, the bankruptcy court dismissed  
26 Trustee's legal challenge to Altick's right to amend the  
27 exemption, and Trustee did not appeal that decision. Thus, the  
28 only remaining question is factual, whether Altick engaged in bad  
faith in amending the exemption, an issue reviewed for clear  
error. Altick agrees that: "This Court reviews the bankruptcy  
court's findings of the debtor's bad faith with respect to his  
claim of exemption for clear error." Altick Op. Br. at 8.



1 as a status conference and schedule further hearings as  
2 appropriate." Here, Altick argues based on the bankruptcy court's  
3 comments in the footnote in Memorandum I that, after the first  
4 hearing, Trustee had not offered evidence to establish a genuine  
5 issue of material fact concerning Altick's alleged bad faith, and  
6 therefore, the bankruptcy lacked any basis for allowing a second,  
7 evidentiary hearing. We conclude that Altick's procedural  
8 argument lacks merit for several reasons.

9 First, the bankruptcy court did not make a finding that there  
10 was no genuine issue of material fact. The court's footnote  
11 comment that nothing Trustee submitted would meet her burden was,  
12 at best, an observation, not a finding.

13 Second, Local R. § 9014-1(b)(3)(C) simply cannot be read to  
14 bind the court in any way. Note that the operative words here  
15 are: "The court may treat. . . ." These words are permissive, not  
16 mandatory. And this conclusion is reinforced by the introductory  
17 words beginning Local R. § 9014-1(b)(1)(a), indicating that the  
18 provisions of the rule applied to hearings in contested matters,  
19 "[u]nless otherwise ordered . . . ." Clearly, then, even if the  
20 local rule were implicated here, the bankruptcy judge had  
21 discretion to vary the procedure.

22 Third, Ninth Circuit case law recognizes that a court has  
23 discretion to continue a hearing or trial.

24 It was not an error for the bankruptcy court to continue  
25 the [] motion for a further hearing . . . . Trial  
26 courts are vested with "ample discretion to control  
27 their dockets." Med. Lab. Mgmt. Consultants v. Am.  
28 Broad. Co., 306 F.3d 806, 826 (9th Cir.2002). This  
discretion necessarily includes the option to refuse to  
rule on particular issues, id., and to consider  
additional evidence. Pit River Home & Agr. Coop. Ass'n  
v. United States, 30 F.3d 1088, 1096 (9th Cir. 1994).

1 Ng v. Farmer (In re Ng), 477 B.R. 118, 119-20 (9th Cir. BAP 2012).  
2 The bankruptcy court may continue a hearing on its own motion.  
3 United States v. Orlando, 553 F.3d 1235, 1237 (9th Cir. 2009) ("A  
4 [trial] court's grant or denial of a continuance is reviewed for  
5 abuse of discretion even where, as here, no motion for continuance  
6 was made."); United States v. Moreland, 509 F.3d 1201, 1211 (9th  
7 Cir. 2007) (same).

8 Finally, in this case, it may well have been an abuse of  
9 discretion for the bankruptcy court not to continue the hearing so  
10 that Trustee could submit evidence concerning Altick's alleged bad  
11 faith. A debtor's subjective state of mind is an important factor  
12 in determining whether a debtor has engaged in bad faith. Tyner  
13 v. Nicholson (In re Nicholson), 435 B.R. 622, 630 (9th Cir. BAP  
14 2010). A trial court's consideration of a litigant's state of  
15 mind, for purposes of determining intent, largely turns on the  
16 court's assessment of that litigant's credibility. Hernandez v.  
17 New York, 500 U.S. 352, 364 (1991). A bankruptcy court abuses its  
18 discretion when it refuses to hold an evidentiary hearing on  
19 disputed questions of fact that hinge on the credibility of  
20 witnesses. Syob v. Bryan (In re Bryah), 261 B.R. 240, 247-49 (9th  
21 Cir. BAP 2001) (citing United Commercial Ins. Serv. V. Paymaster  
22 Corp., 962 F.2d 853, 858 (9th Cir. 1992)).

23 Here, the bankruptcy court opted to decide the legal issue  
24 raised by Trustee in opposition to Altick's amended exemption  
25 claim first. When it decided that Altick's exemption claim was  
26 not barred by the prior confirmation of the chapter 11 plan, the  
27 bankruptcy court properly directed Trustee to schedule an  
28 evidentiary hearing concerning Trustee's allegation that Altick

1 was guilty of bad faith in asserting the amended exemption for his  
2 interest in Gold Dome. For these reasons, we conclude that the  
3 bankruptcy court did not abuse its discretion when it did not  
4 conclude the proceedings after the first hearing on the Exemption  
5 Objection.

6 **II. The bankruptcy court did not clearly err in finding that**  
7 **Altick acted in bad faith in asserting his amended claim**  
8 **of exemption.**

9 Rule 1009(a) provides that a debtor may amend schedules "as a  
10 matter of course at any time before the case is closed." Fed. R.  
11 Bankr. P. 1009(a). However, a debtor's right to amend schedules  
12 is not unfettered. Rule 4003(b)<sup>4</sup> permits a party in interest,  
13 which includes Trustee in this case, to object to a debtor's  
14 amended claim of exemption. And both the Ninth Circuit and this  
15 Panel have adopted the Eleventh Circuit's holding in Doan v.  
16 Hudgins (In re Doan), 672 F.2d 831, 833 (11th Cir. 1983), that a  
17 bankruptcy court may disallow a claim of exemption on a showing of  
18 "bad faith by the debtor or prejudice to creditors." Martinson v.

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19 <sup>4</sup> (b) Objecting to a claim of exemptions.

20 (1) Except as provided in paragraphs (2) and (3), a  
21 party in interest may file an objection to the list of  
22 property claimed as exempt within 30 days after the  
23 meeting of creditors held under § 341(a) is concluded or  
24 within 30 days after any amendment to the list or  
25 supplemental schedules is filed, whichever is later. The  
26 court may, for cause, extend the time for filing  
27 objections if, before the time to object expires, a  
28 party in interest files a request for an extension.

(2) The trustee may file an objection to a claim of  
exemption at any time prior to one year after the  
closing of the case if the debtor fraudulently asserted  
the claim of exemption. The trustee shall deliver or  
mail the objection to the debtor and the debtor's  
attorney, and to any person filing the list of exempt  
property and that person's attorney.

Rule 4003(b)(1) and (2).

1 Michael (In re Michael), 163 F.3d 526, 529 (9th Cir. 1998);

2 In re Nicholson, 435 B.R. at 630.

3 Courts have cited numerous examples of debtor conduct  
4 constituting bad faith that justify denial of an exemption or an  
5 amendment to an exemption. The most common example is where a  
6 debtor attempts to conceal an asset. Kaelin v. Bassett  
7 (In re Kaelin), 308 F.3d 885, 890 (8th Cir. 2002);  
8 In re Nicholson, 435 B.R. at 630. Although we find little  
9 difference between the bad faith intention of a debtor in  
10 concealing an asset, and that exhibited by disclosing the asset  
11 but misrepresenting its value, bad faith can also be found where,  
12 as here, the debtor provides a false value regarding a disclosed  
13 asset. Hannigan v. White (In re Hannigan), 409 F.3d 480, 482  
14 (1st Cir. 2005)(undervaluing an asset was bad faith and resulted  
15 in loss of right to claim an exemption); Bauer v. Iannoccone  
16 (In re Bauer), 298 B.R. 353 (8th Cir. BAP 2003) (bad faith existed  
17 where debtors concealed the equity in their home, and when fire  
18 destroyed the home, they attempted to assert true value and claim  
19 homestead exemption in the insurance proceeds); see also 4 COLLIER  
20 ON BANKRUPTCY ¶ 522.08[1] (Alan N. Resnick & Henry J. Sommer, eds.,  
21 16th ed., 2009)(bad faith shown when debtor lists erroneous value  
22 on assets claimed exempt). Whether a debtor has exhibited bad  
23 faith in making an amendment to an exemption claim is determined  
24 by the totality of the circumstances. In re Nicholson, 435 B.R.  
25 at 630.

26 The bankruptcy judge presided over proceedings spanning four  
27 years in this bankruptcy case, both under chapter 11 and  
28 chapter 7. The court found that, during the case, Altick shifted

1 his position regarding the value of his member's interest in Gold  
2 Dome. In his original schedules filed on March 31, 2008, Altick  
3 listed the value of his interest in the LLC as "unknown." This  
4 was despite his valuation of the entire property in schedule B, of  
5 which he owned 50 percent, as \$3 million less \$960,000 in debt.  
6 Additionally, Altick admitted that he filed his chapter 11  
7 petition to stop the sale of his interest by the state court for  
8 \$350,000. Then, a few days later on April 8, 2008, at the  
9 chapter 11 § 341(a) meeting, he told counsel for UST that Gold  
10 Dome was his "one asset" with "significant equity." Memorandum II  
11 at 3. Ten months later, in his February 2009 disclosure statement  
12 liquidation analysis, Altick valued his interest in Gold Dome as  
13 "0" with net equity of "0." Altick repeated the "0" value for his  
14 interest at his Rule 2004 examination conducted by Trustee in  
15 November 2009.

16 Altick's principal argument to explain the change in his  
17 values for his interest in Gold Dome was that the \$350,000 offer  
18 made just before the bankruptcy petition was filed was for the  
19 purchase of not only the Cabo villa, but three adjacent lots as  
20 well. Therefore, Altick explains, since the lots were sold off  
21 during the bankruptcy case, the value of Gold Dome (with only the  
22 villa remaining) was thereafter considerably less.

23 The bankruptcy court, however, had evidence that the  
24 prebankruptcy \$350,000 offer was for the membership interest in  
25 the villa without the three adjacent lots. Charles Ingram, the  
26 purchaser who attempted to deposit the \$350,000 according to the  
27 state court's order, provided a declaration to the state court  
28 stating that he made his offer with knowledge that the three

1 adjacent lots were to be sold in a separate transaction. Ingram  
2 Dec. at ¶6, March 10, 2008. Two nearly identical letters of  
3 intent, received by the state court at the same time, offered to  
4 purchase for \$350,000 the membership interest of:

5 the Gold Dome, LLC, a California limited liability  
6 company which purports to own all of a resort facility  
7 known as "Villa Golden Dome" located in Cabo San Lucas,  
Baja California Sur, at Camino del Mar #365 (Lot No. 26  
of Block No. 16)[.]

8 Letters (2) of Curtis Berland and James B. House, March 10, 2008.  
9 Lot No. 26 is the Villa alone; the three adjacent lots are Nos.  
10 27, 28, and 29.

11 Although Altick disputed that the \$350,000 offers included  
12 both the villa and adjacent lots, the bankruptcy court was  
13 presented with two permissible views of the evidence and its  
14 choice among them cannot be clearly erroneous. United States v.  
15 Elliott, 322 F.3d 710, 714 (9th Cir. 2003).

16 The bankruptcy court observed that, if the only evidence of  
17 falsity concerning Gold Dome's value was Altick's statement at his  
18 Rule 2004 examination, it doubted that it would sustain Trustee's  
19 objection to the amended claim of exemption; perhaps the passage  
20 of time had erased any of Altick's equity in Gold Dome. However,  
21 the court targeted the evidence provided in the disclosure  
22 statement and liquidation analysis submitted only ten months after  
23 Altick described Gold Dome as his "one asset" with "significant  
24 equity." As the bankruptcy court explained:

25 However, the representation in the disclosure statement  
26 that Gold Dome had no value was patently false and had a  
27 direct impact on the creditors. It gave the creditors  
28 the false impression that liquidation of his assets  
would result in little or no dividend. Had they known  
the truth, Altick's plan would not have been confirmed  
and the case would have been converted two years ago.

1 The court is convinced that Altick intentionally  
2 misrepresented the value of his interest in Gold Dome to  
3 his creditors in order to induce them to go along with  
4 his plan. At that time, Altick knew that his interest  
5 in Gold Dome had significant value. The delay in  
6 liquidating the interest in Gold Dome resulted in a  
7 greatly diminished dividend to unsecured creditors. It  
8 would be unjust to allow Altick to benefit from the  
9 fruits of his misrepresentation by claiming an exemption  
10 in Gold Dome.

11 Memorandum II at 3.

12 A review of the liquidation analysis supports the bankruptcy  
13 court's findings. The analysis shows Altick's estimate that he  
14 had \$146,100 in net nonexempt assets potentially available for  
15 distribution to creditors, expected to incur \$172,500 in expenses  
16 and fees in the event of a liquidation, resulting in a negative  
17 balance of \$26,400, and a final total of "0" available to  
18 unsecured creditors. The assets listed included Gold Dome with  
19 "0" net available to unsecured creditors. Of course, even a small  
20 increase in Gold Dome's net value would shift the balance into the  
21 black, providing a possible distribution to unsecured creditors.

22 Altick's representations about the value of his interest in  
23 Gold Dome affected whether his proposed plan satisfied the "best  
24 interests of the creditor" test of § 1129(a)(7)(A)(ii), which  
25 requires that:

26 With respect to each impaired class of claims or  
27 interests - (A) each holder of a claim or interest of  
28 such class . . . (ii) will receive or retain under the  
29 plan on account of such claim or interest property of a  
30 value, as of the effective date of the plan, that is not  
31 less than the value of such holder's interest in the  
32 estate's interest in the property that secures such  
33 claims.

34 § 1129(a)(7)(A)(ii). Altick's representation in his disclosure  
35 statement that he had no valuable equity in Gold Dome potentially

1 misled unsecured creditors considering whether to accept Altick's  
2 plan. Altick's confirmation of a chapter 11 plan, based upon an  
3 uninformed balloting process and Altick's inaccurate liquidation  
4 analysis, potentially prejudiced his creditors.

5 The bankruptcy court was well acquainted with the parties and  
6 their positions. It considered evidence that eleven months before  
7 the disclosure statement was filed, Altick filed the chapter 11  
8 petition to avoid the sale of his interest in Gold Dome for  
9 \$350,000, a sum that had actually been deposited in an escrow  
10 account. The bankruptcy court was given documentary evidence that  
11 there were two other offers for his interest for approximately the  
12 same amount. At one time, Altick had described his interest in  
13 Gold Dome as his one asset with significant equity. While Altick  
14 testified that real estate prices declined during the relevant  
15 period, he provided no other admissible evidence to support his  
16 theory. In addition, there were conflicting statements and  
17 documents relating to the amount of debt chargeable against  
18 Altick's interest.

19 Simply put, the bankruptcy court did not clearly err when it  
20 found that Altick was not forthcoming when he originally disclosed  
21 the value of his Gold Dome interest to the bankruptcy court and  
22 Trustee. The bankruptcy court was presented with two conflicting  
23 views of the evidence regarding Altick's knowledge and intention  
24 in previously representing to the bankruptcy court and creditors  
25 that his interest in Gold Dome had no value. After considering  
26 the evidence, the bankruptcy court found that Altick had  
27 misrepresented the value of Gold Dome to his creditors in order to  
28 induce them to support his chapter 11 plan. As a result, the



1 bankruptcy court declined to allow Altick an opportunity to exempt  
2 the value of Gold Dome to be realized by Trustee in the chapter 7  
3 case. The bankruptcy court's choice of two permissible views was  
4 not clearly erroneous. Elliott, 322 F.3d at 714.

5 **CONCLUSION**

6 The bankruptcy court did not clearly err when it found that  
7 Altick had engaged in bad faith. Therefore, the bankruptcy court  
8 did not err when it denied Altick's amended claim of exemption as  
9 to the Gold Dome interest. We AFFIRM the order of the bankruptcy  
10 court.<sup>5</sup>

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26 <sup>5</sup> Trustee argues that the bankruptcy court's order can be  
27 affirmed for the same reason she urged in the bankruptcy court:  
28 that Altick was barred from asserting an amended exemption claim  
as to Gold Dome by the preclusive effect of his confirmed  
chapter 11 plan. Given our disposition, we need not, and do not,  
reach Trustee's alternate argument.